No. 2443:

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

THE SOUTHERN PACIFIC COMPANY,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR:

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STATEMENT OF THE CASE:

The United States brought suit in the District Court for the Arizona District to recover from the Southern Pacific Company penalties under the Act of March 4, 1907 (34 Stat. L. p. 1415), known as the "Hours of Service Act;" the Complaint was in *twelve* Counts; the *first six* Counts (Tr. p. 1-7) related to the hours of service on *one* train, and the

last six (Tr. p. 7-14) Counts (the present case), to the hours of service *on another train.*

These *last six* counts of the *Complaint* (Tr. p. 7-14) are the *only ones* involved on this Writ of Error; these *last six* Counts are identical (except as to names of the trainmen), and charge that on train Extra, Engine No. 2794, leaving Tucson at 5:20 A. M. December 22, 1912, with Bowie as its destination, the train crew were permitted to remain on duty from 5:20 A. M. to 10:50 P. M. a period of 17 hours and 30 minutes (Tr. p. 7-9).

The *Answer* admits that the six persons named constituted the train crew of this train between Tucson and Bowie, that they went on duty at 5:20 A. M. and were finally relieved at 10:50 P. M. (Tr. p. 21).

As an affirmative Answer and Defense to the *last six* Counts, the Defendant set up in its *Answer* the following: (Tr. p. 21, 22):—

> "The defendant alleges, by way of relief and exoneration from the provisions of the statute in plaintiff's said complaint set out, that the said extra train No. 2794 was delayed and detained en route at a station called Esmond, in the county of Pima, State of Arizona, while en route on the day and date named in Plaintiff's complaint for the period of one hour and thirty minutes on account of and by reason of the said train breaking-in-two, and that the said break-in-two and delay of one hour and thirty

minutes was the result of a cause not known to the defendant or its officers, agents, or any of them in charge of said train and of such employees at the time said train and employees left Tucson, the terminal, from which it started at———A. M., on said date; and that the same was caused by an unavoidable accident and one that could not have been foreseen by this defendant or any of its officers, agents or employes; all of which and the time of delay was promptly reported to the Interstate Commerce Commission by the defendant herein, together with the defendant's claim of exemption for the one hour and thirty minutes delay at Esmond as aforesaid."

To this *Affirmative* Defense contained in the Answer of Defendant in Error, the Government demurred upon the following grounds (Tr. p. 23, 24):—

"Now comes the above-named plaintiff, by its attorney, and demurs to that part of the defendant's answer filed herein relating to the 7th, 8th, 9th, 10th, 11th, and 12th causes of action of plaintiff's petition, and assigns the following grounds of demurrer:

1. It does not appear that the breaking-in-two of the train at Esmond, and the delay thereto, was not known to the defendant, or its officer or agent in charge of said employees at the time they left a terminal.

2. It does not appear that the breaking-in-two of the train at Esmond prevented the defendant from relieving the employee named in

any of said causes of action before he had been continuously on duty more than sixteen hours.

3. It does not appear that the failure of the defendant to relieve the employee named in any of said causes of action before he had been continuously on duty more than sixteen hours was due to a casualty of unavoidable accident or the act of God; or that the failure to so relieve such employee was the result of a cause not known to the defendant or its officer or agent in charge of such employee at the time he left a terminal and which could not have been foreseen.

4. It does not appear that the defendant made any effort whatsoever to relieve the employee named in any of said causes of action before he had been continuously on duty more than sixteen hours.

5. The facts pleaded do not constitute a defense to any of said causes of action."

The Court *overruled* this Demurrer, and made the following Order (Tr. p. 26) overruling Demurrer, viz:—

"On this day this cause came on for hearing on the demurrer of the plaintiff to the answer of the defendant to the 7th, 8th, 9th, 10th, 11th, and 12th causes of action set forth in the complaint, and said demurrer was thereupon argued by M. C. List, Esquire, on behalf of the Plaintiff, and by Francis M. Hartman, Esquire, on behalf of the defendant and was submitted to the Court for decision, and thereupon it was ordered that said demurrer be overruled, to

> which order and ruling of the court, the plaintiff by its counsel, then and there in open court excepted. The plaintiff declined to amend its complaint with respect to the 7th, 8th, 9th, 10th, 11th, and 12th causes of action set forth therein, and declined to plead further with respect thereto, but elected to stand upon the pleadings, and thereupon the cause was called for trial upon the 1st, 2d, 3d, 4th, 5th, and 6th causes of action set forth in the complaint."

A jury was selected to try *the other six first* Counts upon which *a directed* verdict was rendered in favor of Plaintiff in Error; thereupon the Court rendered its *Judgment* as follows (Tr. p. 32, 33) :—

> "And it is further ORDERED, ADJUDGED AND DECREED, that the said plaintiff take nothing by the seventh, eighth, ninth, tenth, eleventh, and twelfth causes of action in its complaint, and that as to each and all those causes of action the defendant go hence without day."

The Government conceded (Brief, p. 3) that this *Affirmative* Answer is a sufficient defense and brought the case under the *proviso* in Section 3 of the Act, *unless* the Defendant, as a matter of strict law, could not continue the train crew in service and on duty for the additional 1 hour and 30 minutes required for the train to reach *its other terminal*, Bowie, where the crew was finally relieved.

The period of *service* was 17 hours and 30 minutes; the *delay* was 1 hour and 30 minutes.

Throughout this Brief the *Italics*, in nearly *all* instances *are ours.*

ARGUMENT:

I

The learned Counsel for the Government, on pages 5 and 6 of their "Brief and Argument of Plaintiff in Error", state the following, as the *questions* involved on this Writ of Error, viz:—

"QUESTIONS INVOLVED:

"1. Does a delay to a train by reason of some unavoidable accident automatically extend to the carrier a license to permit its employees thereon to continue the operation of such train to the end of their usual or customary run?

"2. Where a carrier fails to relieve an employee after he has been in continuous service 16 hours, can such failure be justified by merely showing that somewhere on its run the train in question was delayed by one of the causes set forth in the proviso of section 3 of the hours-of-service act?

"3. Do the provisions of the hours-of-service act authorize a carrier to require its employees in train service to remain continuously on duty for 16 hours and for so much longer as they may possibly have been delayed en route by reason of some unavoidable accident?

"4. Do the words "a terminal", as used in the proviso of section 3, of the hours-of-service act, mean—

"(a) Only *the* terminal from which an employee in question starts on his trip? or

(b) *Any* terminal through which such employee may pass while enroute to the end of his usual or customary run?"

Therefore, it appears *conceded* before the Court that the Answer *sufficiently pleads* as a defense and excuse for this 1 hour and 30 minutes *overservice*, the following:—

(1) That this train *broke in two after leaving* its starting terminal Tucson, and while en route to its destination terminal Bowie, at a *station* called Esmond, and the train was *thereby delayed* 1 hour and 30 minutes.

(2)—That this breaking in two of the train was the "*result of a cause*" *not known* to the carrier, &c. "*at the time*" said employee "*left a terminal,*" Tucson, and which "*could not have been foreseen*".

(3)—That this *delay was caused* by an "*unavoidable accident*", and that the breaking in two of the train was an "*unavoidable accident*" (Tr. p. 21, 22).

Thus establishing as the *cause* of this *Overservice* of the train crew (a)—The *delay* of 1 hour and 30 minutes caused by the breaking in two of the train, not known, could not be foreseen &c; and (b)—*Unavoidable accident* resulting from this breaking in

two of the train, and *causing* the *overservice* of the train crew; and *both* expressly *exempting* the Defendant in Error under the proviso of Section 3 of this Act.

And on page 12 of their Brief, the learned Counsel for the Government expressly state:—

> "In the case now under consideration *the train was delayed by an unavoidable accident*, which undoubtedly jeopardized the lives of its crew"—(Brief for *Plaintiff* in Error, p. 12).

But, the learned Counsel for the Government say: this *unavoidable accident* did not justify Defendant in Error *continuing* this train crew *in service to* its and their destination terminal, Bowie; and that they should have been relieved from duty at some *intervening* terminal.

FIRST:—The record does not show nor does it in any way appear that there was *any terminal* between *the place* of this *unavoidable accident* and Bowie, the destination terminal of this train *and* crew.

Consequently, the fact that this train crew was not relieved *before* the terminal at Bowie was reached, does not arise and is not before the Court upon the record on this Writ of Error from the judgment.

SECOND:—As a result, there is left for decision before this Court, only the single question: Was it

a violation of Sections 2 and 3 of this Act *to continue in service* this train crew *to the destination terminal* of both train and crew, Bowie, thus keeping the crew *on duty* 1 hour and 30 minutes *in excess* of the 16 hours specified in the Act?

This question and the *other* question raised by the Government as to the duty to *relieve* the train crew *at an intervening* terminal, if such there be, really involve the same consideration if *both* questions can reasonably be said to be before the Court for decision.

The learned Counsel for the Government, on page 28 of their Brief quote Ruling 88, May 25, 1908, by the *Interstate Commerce Commission*, on this subject, as follows:

> "May 25, 1908. Ruling 88.
> "(b) Section 3 of the law provides that—
> "The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen."
> "Any employee *so delayed may thereafter continue on duty to the terminal or end of that run.* The proviso quote removes the application of the law to that trip."

Senator *Bacon*, on the consideration of this Act by Congress, said:—

"*All railroad men have their homes at or near their terminal, a place where their families are located,* etc., *where they are supposed to take their principal rest,* and where lie-overs are permitted. Under the bill as it stands it is required that there should be ten hours' rest. As suggested in that communication, *a railroad employé* starting from his home, and making it may be a hard run to the other terminal, *is very desirous to get back to his home and have his rest there;* but he would be compelled under the bill to remain 10 hours at the other terminal, and in that way have that much less rest at his home terminal."

Congressional Record, 59th Congress, 2d Session, (Vol. 41, part 1,—p. 823.)

The Case of Atchison T. & S. F. Ry. Co vs. U. S. 177 Fed. 114, was decided by the Circuit Court of Appeals for the Seventh Circuit, Circuit Judge *Grosscup* rendering the opinion, and was *affirmed* by the *Supreme* Court in the 220 U. S. 37; on pages 118, 119, the Opinion states:—

"The contention of the Government is, that while in neither of the cases above mentioned was the operator required or permitted to remain on duty for more than nine hours in any twenty-four in the aggregate, such service, within the contemplation of the statute either is to be divided into 'two periods', separated by the intermission (for which the statute makes no provision), or is to be considered as 'one period', including the intermission, which would make it a period of twelve hours. But

manifestly, Congress did not intend that an intermission of three hours, in the middle of the day, should be computed as a part of the employee's service; for *the statute was enacted in view of the customs of the land*, and the customs of the land do not include such intermissions as a part of the working hours of employees. The position of the Government is therefore reduced to its contention respecting the word 'period',—that 'period' is a 'term', 'a cycle', something 'continuous' between a definite beginning and a definite end—whereby, invoking the canon of strict construction in criminal statutes, the period was a period of twelve hours, notwithstanding the intermission.

"We cannot concur in this view. The statute was passed *with custom as a background.* According to custom, nine hours' work unquestionably means nine hours' *actual* employment, whether broken by an intermission for lunch or on account of some other occasion. According to custom, too, especially in railroading in the new western States, the actual service of employees is divided, necessarily divided, throughout the day, to correspond with the arrival and departure of trains. Certainly, Congress did not intend to override these existing customs; making it necessary either that the railroad company should not give intermissions, or that the employee should be paid notwithstanding the intermissions; and making it necessary at many stations (presumably well known to Congress) that the railroad should either employ a different telegraph operator for every train that came and went

(trains on western roads being often more than nine hours apart), irrespective of the fact that the actual service for each train was a very short period of time. The contention of the Government gives to this word 'period', all things considered, a highly strained meaning. Disregarding a meaning so strained, and reading the word in connection with the context, and *in the light of ordinary custom*, we are clear that the acts proven do not constitute an offense within the meaning of the law. And, if it be objected that under this construction of the law, it would be possible for the railroad company to require its operators to give their service for short period at short intervals, say every alternate hour, or any hour in every two hours and a half, thus so spreading his actual service over the twenty-four hours that no opportunity would be given for real recuperation, the answer is that no instance of such practice has been brought to our attention, and no such instance is likely, which accounts for the fact that no provision in the Act is made for such instances. When such practice actually occurs, Congress will doubtless provide a cure."

In United States vs. Atchison, T. & S. F. Ry. Co., 212 Fed. 1000, District Judge *Sawtelle* rendered an Opinion which so thoroughly considers and decides all these questions, that we quote so much of it as pertains to this case in full, as follows, (nearly all italics being ours) :—

SAWTELLE, District Judge. This is an action brought by the United States against the Atchison, Topeka & Santa Fe Railway Company, under the provisions of the act of Congress of March 4, 1907 (Act March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1911, p. 1321]), entitled, "An act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon."

Section 2 of said act is as follows:

"That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employé subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employé of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty."

Section 3 provides "that any such common carrier, or any officer or agent thereof, requiring or permitting any employé to go, be or remain on duty," in violation of said second section above quoted, "shall be liable to a penalty of not to exceed five hundred dollars for each and every violation."

The first three counts of the government's complaint relate to the conductor and two brakemen in charge of defendant's train No. 18, on October 4 and 5, 1912.

No. 18 was a mail, passenger and express train running between Los Angeles, Cal., and Phoenix, Ariz., and in the course of its run

passed through San Bernardino, Barstow, and Parker. Los Angeles was the initial terminal or starting point for this train, for its engine crew and also for its train crew, that is, its conductor and brakemen. The final destination of the engine crew was Barstow, of the train crew was Parker, and of the train itself was Phoenix. * * *

The train crew, therefore, was kept in continuous service for a period of 19 hours and 17 minutes.

The defendant, in its answer, admitted the excess service of the train crew, but set up an affirmative defense, to wit, that all of the excess service was due to the detention of train No. 18 at Summit by reason of a casualty or unavoidable accident unknown to the carrier, and which could not have been foreseen at the time No. 18 left "said terminal at Los Angeles." The answer (as amended) also alleged that train No. 18 did not leave "a terminal" of the defendant after the casualty had happened, or after it was known to the defendant. The defendant, therefore, attempted to bring itself within the proviso of section 3 of the Hours of Service Act, which reads as follows:

"The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time said employé left a terminal and which could not have been foreseen."

The particular fact pleaded, and shown in evidence to be the casualty or unavoidable accident directly responsible for the excess service,

was the derailment of a freight car in a westbound freight train between Barstow and Los Angeles, known as "Extra West 954." It is not necessary here to refer particularly to the movement of Extra 954, nor to the inspection to which it was subjected before it left Barstow, for the reason that the government does not contend that it was not properly inspected, but, for the purposes of this case, admits that the breaking in two of this extra near Summit and the consequent derailment of a car and the blocking of the main line at that point was clearly unavoidable and unknown and unforeseen to the carrier at the time train No. 18 left both Los Angeles and San Bernardino. At the time the train left Summit it was known to the officials of the company in charge of this train that the conductor and brakemen, if allowed to continue on their regular run to Parker, would be on duty over 16 consecutive hours. The evidence shows that Barstow was a terminal of the defendant for freight trains and freight crews, and also it was the terminal for one or more passenger crews running between Barstow and Bakersfield, but was not the terminal for passenger crews running between Los Angeles and Parker.

It is contended by the government that the court should direct a verdict in its favor for the following reasons: Barstow was a "terminal," within the meaning of that term in the proviso, and therefore any delays known to the officials of the company before train No. 18 left Barstow could not be accepted as an excuse, and that, even if Barstow were not a "terminal,"

as that term is used in the proviso, still train No. 18 was allowed to leave there, knowing that the conductor and brakemen would be in continuous service over 16 hours when a relief crew (although the evidence shows that at that time there was no passenger crew that could have been used as a relief crew on train No. 18) could have been put on this train at Barstow and relieved the old crew at any time within, or at the expiration of, the 16 hours.

[1] The complaint alleging, and defendant in its answer admitting, that the defendant had required or permitted its said employés on said train No. 18 above named to remain on duty for a longer period than 16 consecutive hours, this made a prima facie case. United States v. Kansas City Southern Ry. Co. (C. C. A. 8th Cir.) 202 Fed. 828, 121 C. C. A. 136; C., B. & Q. R. R. Co. v. United States, 195 Fed. 241, 115 C. C. A. 193.

There appear to be three separate provisions in section 2 of said act, the violation of which subjects the carrier to a penalty: (1) That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employé subject to this act to be or remain on duty for a longer period than 16 consecutive hours; (2) and whenever any such employé of such common carrier shall have been continuously on duty for 16 hours, he shall be relieved and not required or permitted again to go on duty until he has had at least 10 consecutive hours off duty; (3) and no such employé who has been on duty 16 hours in the aggregate in any 24-hour period shall be re-

quired or permitted to continue or again go on duty without having had at least 8 consecutive hours off duty.

Section 3 of said act sets forth the penalty for violation thereof, and then provides that the *provisions* (meaning all of the provisions of the act, including the one in section 2 above quoted, fixing a penalty for violation thereof) *shall not apply*—

"in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time said employé left a terminal, and which could not have been foreseen: Provided further, that the provisions of this act shall not apply to the crews of wrecking or relief trains."

[2] It is contended by the government that it was unlawful for the defendant company to have caused its employés to work or remain on duty after the 16-hour limit, longer than was necessary to reach the first proper stopping place where its crew could have been replaced, and there it should have been tied up, and that it was its—

"duty to have suitable stopping places where rest can be had for its employés, or proper places along its route proportionate to the exigencies of the business."

It has been said that this act is remedial in its nature, and should "receive such construction as will give its general purpose reasonable effect." To this we are agreed; but at the same time we cannot lend ourselves to a construction which would violate the plain letter of the act and entirely destroy the proviso therein contained. Had Congress not intended that the

carriers should be relieved in case of casualty, unavoidable accident, or the act of God, it would not have inserted the proviso in the act. It is a well-known fact that this legislation was before Congress for many months, and that much testimony was taken by the several committees of that body before the final draft of the act was completed; and we must assume that Congress intended that the carriers should be excused from the penalties of the act, and that the act should not apply whenever the delay was caused by casualty, unavoidable accident, or act of God.

The plain wording of the proviso involved is:

"The provisions of this act *shall not apply* in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time said employé left a terminal, and which could not have been foreseen."

How, then, can this court assess a penalty in a case like the one at bar, where it is plainly shown that the crew were kept on duty by reason of casualty or unavoidable accident, in face of the statute, which for such causes excuses defendant? In cases of this nature, to adopt the construction contended for by the government would be equivalent to nullifying the proviso contained in the act, and would require of the defendant the performance of a duty not only not required, but expressly excused by the act itself. Had Congress intended that, in case of delay occasioned by "casualty, unavoidable accident or the act of God," the train should only be allowed to go to the first suitable stop-

ping place and there tie up, it would have inserted such a provision in the act—one similar to the provision contained in the amendment to the Safety Appliance Act, approved March 4, 1911 (Act March 4, 1911, c. 285, 36 Stat. 1397 [U. S. Comp. St. Supp. 1911, p. 1338]). Section 4 of this act (Act April 14, 1910, c. 160, 36 Stat. 299 [U. S. Comp. St. Supp. 1911, p. 1329]) contains a proviso as follows:

"That where any car shall have been properly equipped, as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure *to the nearest available point where such car can be repaired,* without liability for the penalties imposed by Section Four of this Act," etc.

In this connection, it might be well to refer to the administrative rulings of the Interstate Commerce Commission, as contained in its Twenty-Second Annual Report, dated December 24, 1908. In referring to the act in question, the Commission said:

"Questions immediately arose as to its proper interpretation. With a view to explaining in so far as possible those features of the act which might be claimed to be ambiguous, the Commission issued the following administrative rulings: * * * 'Section 3. * * * *Employés unavoidably delayed by reason of causes that could not, at the commencement of a trip, have been foreseen, may lawfully continue on duty to the terminal or end of that run.*' "

Thus it appears that the Commission to which was intrusted the execution of this law,

and whose duty it was to ascertain whether or not its provisions were being observed, not only ruled that, "Employés *unavoidably delayed by reason of causes that could not, at the commencement of a trip*, have been foreseen, *may lawfully continue on duty to the terminal or end of that run*," but actually used the words "terminal" and "end of that run" synonymously. In other words, *they not only defined the word "terminal"* to mean the equivalent of the *end of that run*, but actually held that employés unavoidably detained by reason of causes that could not, at the commencement of the trip, have been foreseen may *"lawfully continue on duty to the terminal or end of that run."* See Conference Rulings of the Commission issued April 1, 1911, page 24, Rule 287, which is as follows:

"Any employé so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip."

See, also, pamphlet issued by the Interstate Commerce Commission, containing "The Hours of Service Law and the administrative rulings and opinions therein printed by order of the Commission March 25, 1912," which contains this same rule 287.

The Commission did not then believe that it was the duty of the carrier to stop the train at the first suitable stopping place and there tie up until the men could be relieved, as is contended was the duty of the railroad company in this case.

These administrative rulings were promulgated by the Commission because, as was stated

by them, questions immediately arose as to the proper interpretation of the act, and with a view to explaining, in so far as was possible, those features which might be claimed to be ambiguous, the Commission adopted the rulings above quoted; and it is reasonable to suppose that such administrative rulings were intended for the guidance of the carrier and trainmen and others having to do with the movement of trains. We heartily agree with the Commission that the terms of the act "are susceptible of more than one interpretation."

That the "construction of a statute by those charged with the execution of it is always entitled to the most respectful consideration, and ought not to be overruled without potent reasons," was the rule announced at a very early day by the Supreme Court of the United States and reiterated in a very large number of cases. Heath v. Wallace, 138 U. S. 573, 11 Sup. Ct. 380, 34 L. Ed. 1063, and cases cited.

We cannot adopt the interpretation contended for by the government in this case, namely, that if the train was delayed by reason of any of the causes set out in the proviso in section 3 of the act, the train crew may not lawfully continue on duty to the terminal or end of that run. This court holds that in such a case there is nothing in the act which requires a carrier to proceed to the next suitable stopping place and there tie up and relieve the crew, or which prevents the crew from continuing on duty and proceeding on their trip to the terminal or end of that run, which in this case was at Parker, even though at the time they left Summit, the

place where the train was delayed and remained on account of the unavoidable accident or casualty which occasioned the delay, they had no reasonable expectation of being able to reach the end of their run, Parker, within the 16-hour limit. In the opinion of this court, such a construction is not authorized.

The manifest purpose and effect of this statute is to prohibit railroad companies from requiring or permitting their employés to be or remain on duty for a longer period than 16 consecutive hours, except in case of casualty, unavoidable accident, or act of God, or where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time such employé left a terminal, and which could not have been foreseen, and in case of casualty, unavoidable accident, or the act of God, or where the delay was the result of a cause not known to the carrier or its officers or agent in charge of such employé at the time such employé left a terminal, and which could not have been foreseen, preventing the train crew from completing its run or reaching its destination within 16 hours from the time of going on duty for the run, to take the case out of the operation of the statute, and to permit the crew in charge of any train delayed by such casualty or unavoidable accident or act of God, or other cause not known to or which could not have been foreseen by the officers or agent of the carrier in charge of such crew at the time the crew left a terminal, to continue on duty to the end of the run, *except* where the officers or agent of the railroad in

charge of such crew or employés knew of the existence of, or could have foreseen, such casualty, accident, or act of God, or other cause of delay, before such train crew started upon its run upon which the delay occurred. *If* the officers or agent of the carrier in charge of such train crew knew of the existence of, or could have foreseen, the casualty, accident, or act of God, or other cause of delay, before such train crew started on its run, the statute would apply, regardless of the delay caused thereby, and the railroad company requiring or permitting such crew to continue on duty after 16 hours would, in such case, be liable to the penalty provided by the statute. In all other cases of casualty, unavoidable accident, or act of God, or other cause of delay, the statute would not apply. In other words, the proviso takes the case out of the operation of the statute in every instance except those in which the officers or agent in charge of the employé *knew*, or could have foreseen, the existence of the cause of the delay at the time such employé left the terminal or starting point.

The government also contends that the railroad company violated the provisions of said act by requiring or permitting the said train crew to remain on duty after leaving Barstow, upon the theory that Barstow, although not shown to be a terminal for train No. 18, or for the crew on said train, was nevertheless a terminal, and that said act makes it unlawful for a carrier to require or permit any employé to remain on duty in violation of section 2 of said act, because the proviso in said act contained does not

excuse the defendant "where the delay was the result of a cause not known to the carrier or its officers or agent in charge of such employé at the time such employé left a terminal"; in other words, that the officials of the defendant company knew of the unavoidable accident or casualty which was the cause of the delay to train No. 18 at the time said employés left Barstow, a terminal.

It does not appear that the word "terminal" has been judicially defined. According to the usage of railroad men in the United States, as shown by the evidence in this case, each train crew is assigned by the officers of the company to a definite, fixed run, beginning and ending at fixed points or places on its line of railroad; and, in my judgment, these fixed beginning and ending points of a given run for a given crew are the "terminals" of that run within the meaning of the word "terminal" as used in the proviso in section 3 of this act. In the usage of railroad men there are different "runs" for different train crews, and also different runs for different employés on the same train, and the run of an engineer on a passenger train might be different from the run of a conductor or brakeman. There may be one run for a freight crew and another run for a passenger crew, and these runs may not be, and usually are not, coterminous, and one run or several runs for freight crews may lie between the terminals of the run of a single passenger crew, and each of these runs has its own terminals. And in applying this act to a given case, regard must be had to the line of service

in which the train crew or employés in question were engaged at the time of the alleged violation of the act, and to that alone.

It follows that Barstow was not a terminal for train No. 18, or for said conductor or brakemen, and that the defendant did not violate said act by requiring or permitting the employés mentioned in the complaint to be or remain on duty for a longer period than 16 consecutive hours and in requiring said train crew to continue on duty to the terminal or end of that run."

In United States vs. Missouri Pac. Ry. Co., 213 Fed. 169, the Circuit Court of Appeals for the Eighth Circuit, Circuit Judge *Sanborn* rendering the opinion, said:

"SANBORN, Circuit Judge. The United States complains that the court below overruled a demurrer to the answer of the defendant and rendered judgment in the defendant's favor in an action against it for an alleged violation of the hours of service act. The plaintiff alleged in its complaint that the defendant required and permitted its telegraph operator at Meneger Junction, Kan., an office and station operated only during the daytime, to remain on duty during the 24 hours, commencing at 7 o'clock a. m. December 11, 1911, more than 13 hours, in violation of "An act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon," approved March 4, 1907 (34 Stat. 1415. The defendant answered that its operator at

that station was on duty on December 11, 1911, from 7 a. m. until 12 noon and from 1 p. m. until 6 p. m. and from 7 p. m. on that day until 6:35 a. m. on December 12, 1911; that his hours of service in excess of 13 hours were due to this casualty and unavoidable accident; that through no fault or negligence of the defendant, its agents or servants, a derailment occurred on the main line of its railroad at Nearman, Kan., which made it necessary to detour its trains from Leavenworth to Kansas City over the defendant's branch line through Meneger Junction; that the defendant used every effort to clear its track, and expected to have it cleared by 11 p. m. on December 11th at the latest, but unavoidable difficulties delayed its clearing until 5 a. m. December 12th; that there was no telegrapher on its branch line, on its main line, or on its Omaha Division that could be sent to relieve the operator at Meneger Junction at that time; that after the unavoidable delay an attempt was made to secure a relief operator, but none could be found; that at the time the wreck occurred it might have been possible to secure an operator, but that the defendant did not know at that time that it would require so long to clear the main line. The *plaintiff demurred to this answer*, and counsel for the United States *contend* that the *decision overruling* that demurrer was erroneous: (1) Because the proviso of section 3 of the hours of service law is inapplicable to telegraphers, train dispatchers, and others of their class who fall under the terms of section 2 of the act; (2) because the failure of the defendant, under the

circumstances pleaded in the answer to secure a relief operator, constituted no excuse for keeping the regular operator on duty after the expiration of the 13 hours of service specified for him in section 2 of the act; and (3) because the derailment pleaded in the answer was not such a casualty or unavoidable accident as justified the defendant in keeping the operator on duty beyond the 13 hours of service specified in the act.

* * * * * * *

[1, 2] Are the provisions of section 2 which relate to telegraph operators, train dispatchers, and other employés of their class excepted from the declaration of the proviso of section 3, "that the provisions of this act shall not apply in any case of casualty or unavoidable accident, or the act of God?" Counsel for the United States contend that this question should be answered in the affirmative because section 2 provides that telegraph operators and train dispatchers may serve "in case of any emergency" four hours longer than the time generally fixed for their services when there is no emergency, and they argue that this provision for four hours excess service limits all excess service by them, whether demanded by an emergency, a casualty, an unavoidable accident, or an act of God; that casualties, accidents, and grave catastrophies resulting from landslides, floods, and other external incidents bear more heavily upon other employés than upon telegraphers, and that the four-hour limitation in case of an emergency would become ineffective if any casualty, unavoidable accident, or act of God would relieve

"That the provisions of this act, except those in section 2, which relate to the hours of service of the operators and train dispatchers and others of their class, shall not apply in any case of casualty, or unavoidable accident or the act of God."

[5] But where the legislative body makes no exception to a general and clear declaration of its will, the conclusive presumption is that it intended to make none, and it is not the province of the courts to do so. Madden v. Lancaster Co., 65 Fed. 188, 195, 12 C. C. A. 566, 573; Omaha Water Company v. City of Omaha, 147 Fed. 1, 13, 77 C. C. A. 267, 279, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614; Armour Packing Co. v. United States, 153 Fed. 1, 18, 21, 82 C. C. A. 135, 152, 155, 14 L. R. A. (N. S.) 400; Lafayette Co. v. Wonderly, 92 Fed. 313, 316, 34 C. C. A. 360, 363; Webber v. St. Paul City Ry. Co., 97 Fed. 140, 143, 38 C. C. A. 79, 82.

[6] Another approved rule of construction is that a rational, sensible and practical interpretation of a statute, one which will permit the accomplishment of the purpose of the act, should be preferred to one which is unreasonable or impracticable, or that would hinder or retard the accomplishment of that purpose. United States v. Ninety-Nine Diamonds, 139 Fed. 961, 965, 72 C. C. A. 9, 13, 2 L. R. A. (N. S.) 185; Stevens vs. Nave-McCord Mercantile Co., 150 Fed. 71, 75, 80 C. C. A. 25, 29; American Bonding Co. v. Pueblo Investment Co., 150 Fed. 17, 27, 80 C. C. A. 97, 107, 9 L. R. A. (N. S.) 557, 10 Ann. Cas. 357; McPhee & McGinnity Co. v. Union Pacific R. Co., 158 Fed. 5, 17, 87 C. C. A. 619, 631. The purpose of the provision of

section 3, "that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God," evidently was to relieve the common carriers and their employés in such cases from all the provisions of the act limiting the hours of service of the latter, and the reason for the provision is plain. *Congress perceived, and reflection will convince any one,* that the protection, safety, and welfare of travelers and employés upon railroads require that in such cases *hard and fast rules shall yield* to the demands of humanity and the necessities of the cases. The *times when* such casualties will occur and when such cases will arise *cannot be foreseen. An unavoidable accident is as likely to occur within the last as within the first 10 minutes of the limited 16 hours of the service of a trainman.* It as likely to occur within the last five minutes of the limited four hours excessive service of a telegraph operator as in the first minutes of his limited 9 or 13 hours of service. It is conceded that carriers and all of their employés, except operators, train dispatchers, and members of their class, are exempt from the limitation of their hours of service in every case of casualty, unavoilable accident, or act of God.

* * *

[7] There is still another rule of construction that persuades to the same conclusion. This is a suit for the collection of a penalty of $500 for a violation of this act of Congress. The act created and denounced a new offense. A statute which creates a new offense and prescribes its punishment must clearly state the

persons and the acts denounced. An act which is not clearly an offense by the expressed will of the legislative body before it was done may not be lawfully or justly made such by construction after it is committed, either by the interpolation of expressions, or by the expunging of its words by the judiciary. And as this statute not only failed clearly to denounce as an offense requiring or permitting an operator or train dispatcher to serve beyond the hours limited in section 2 in case of a casualty, an unavoidable accident, or the act of God, but positively declared that in such a case the provisions of the act which denounced such excessive service, as an offense did not apply, the defendant may not lawfully be punished for such an act. United States v. Wiltberger, 18 U. S. (5 Wheat.) 76, 96, 5 L. Ed. 37; United States v. Ninety-Nine Diamonds, 139 Fed. 961, 964, 72 C. C. A. 9, 12, 2 L. R. A. (N. S.) 185; First National Bank of Anamoose v. United States, 206 Fed. 374, 376, 124 C. C. A. 256, 46 L. R. A. (N. S.) 1139.

And the result is that the plain terms of the statute, the reason of the case, and the rules and authorities upon the construction of statues to which reference has been made have convinced that the proviso of section 3 of the "Act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon," approved March 4, 1907, commonly known as the hours of service act, exempts a common carrier from liability for the penalty specified therein when in a case of casualty, unavoidable accident, or

the act of God it necessarily requires or permits a telegraph operator, train dispatcher, or other employé of their class to serve beyond the time limited for his service by section 2 of this act.

The *next contention of counsel for the government is* that the answer destroys the defense that the derailment therein pleaded presented a case of unavoidable accident because it pleads no sufficient excuse for the defendant's failure to furnish another operator to relieve the operator in charge at Meneger Junction, in other words, that the answer fails to plead that the defendant was not negligent in this regard. *But this is not an action for the negligence of the company in failing to procure a relief* operator within a reasonable time. It is an action for requiring *the service* of the operator in charge *more than 13 or 17 hours*, in violation of section 2 of the act, and *the answer is that this was a case of a casualty or unavoidable accident*, and that the prohibition of requiring the operator's service more than 13 hours, or more than 17 hours, is inapplicable.

Again, if the penalty here sought could have been recovered on account of the negligence of the defendant in securing a relief operator, *no such negligence was charged or pleaded.* All persons are presumed to discharge their duties faithfully until the contrary appears, and there was therefore a legal presumption that the defendant exercised due diligence to procure such a relief operator and this presumption is sustained by these facts, which are alleged in the answer and admitted by the demurrer.

* * *

[3] Finally, counsel for the United States insist that the unavoidable accident, the derailment pleaded in the answer, was not a casualty or an unavoidable accident because the defendant failed to use due diligence to avoid it, and they quote this sentence from the opinion of this court in United States v. Kansas City Southern Ry. Co., 202 Fed. 828, 833, 121 C. C. A. 136, 141:

"To bring itself within the exceptions stated, the carrier must be held to as high a degree of diligence and foresight as may be consistent with the object aimed at, and the practical operation of its railroad."

But counsel are estopped from making this contention by their demurrer which admits this averment of the answer, "that through no fault or negligence of the defendant company, its agents or servants, a derailment occurred on the line of the defendant," and this is an averment that, however high the degree of diligence and foresight required in regard to this derailment, the defendant exercised that degree, for so only could it have been without fault or negligence.

The court below committed no error in overruling the demurrer to the answer and the judgment below is affirmed."

Section 2 of this Act expressly prohibits: 1—requiring or permitting employees to remain *on* duty for a longer period than 16 consecutive hours; 2—not relieving employee who shall have been continuously on duty for 16 hours; 3—allowing employee *ten* consecutive hours *rest;* 4—allowing *eight* con-

secutive hours *rest* where employee *on* duty *in the aggregate* 16 hours.

A fair and reasonable construction of this Section 2, and the *Proviso* of Section 3, *Exempting absolutely* cases of casualty, unavoidable accident, act of God, and where the *delay* was the result of a cause not known when train left a terminal and could not be foreseen, is this: that in *such* cases the train crew may be continued in service and on duty to the end of their *run* or their *terminal*, but *must be allowed their* 10 consecutive hours *rest before* being required or permitted to go *on* duty again.

In United States vs. Atchison T. & S. F. Ry. Co. 212 Fed. 1000, Judge *Sawtelle* very fully discusses the meaning of "terminal" as used by railroads and intended by this Act, and on page 1007 says:—

> "It does not appear that the word "terminal" has been judicially defined. *According to the usage of railroad men in the United States*, as shown by the evidence in this case, *each train crew is assigned* by the officers of the company *to a definite fixed run, beginning and ending at fixed points or places on its line of railroad;* and, in my judgment, these fixed beginning and ending points of a given run for a given crew are the "terminals" of that run within the meaning of the word "terminal" as used in the proviso in section 3 of this act. In the *usage of railroad men there are different 'runs' for different train crews*, and also different runs for different employees on the same train,

and the run of an engineer on a passenger train might be different from the run of a conductor or brakeman. There may be one run for a freight crew and another run for a passenger crew, and these runs may not be, and usually are not, coterminous, and one run or several runs for freight crews may lie between the terminals of the run of a single passenger crew, and each of these runs has its own terminals. And in applying this act to a given case, regard must be had to the line of service in which the train crew or employes in question were engaged at the time of the alleged violation of the act, and to that alone.

"It follows that Barstow was not a terminal for train No. 18, or for said conductor or brakemen, and that the defendant did *not violate* said act *by requiring* or permitting the employes mentioned in the complaint *to* be or *remain on duty for a longer period than* 16 consecutive hours *and in requiring said train crew to continue on duty to the terminal or end of that run.*"

In U. S. vs. Northern Pac. Ry. Co. 215 Fed. 64, 67, this Court, Circuit Judge *Ross* rendering the Opinion, where the charge was *continuing* the train crew *on duty, without rest, after* an "unavoidable accident," said:—

" * * * it is expressly conceded by Counsel for the Government that the *delay* of the crew in question on its regular run from Tacoma to Portland was due to the "unavoidable accident" at South Tacoma. It is equally plain

from the undisputed evidence that the accident was the sole cause why the crew in question was engaged on its run for more than 16 hours without a rest of 8 consecutive hours, so that the question is, whether the circumstances of the case bring it within the first proviso in Section 3 of the Act of Congress, upon which the action is based. * * * Under such circumstances, it would not, we think, be reasonable to hold the Company liable for their failure to check up the time of service of the various crews of the very numerous trains passing over this particular piece of road at that particular time. And *such*, we think, *was the view* of Congress *in providing, as it did, that the Act* of May 4, 1907, *should "not apply in any case of casualty* or unavoidable accident."

"We are of the opinion that the Court below was right in holding that the circumstances of the present case brought it within that proviso."

In the present case, the learned Counsel for the Government, on page 12 of their *Brief*, say:—

> *"In the case now under consideration the train was delayed by an unavoidable accident."*

And again, page 11: "While the pleadings in the instant case *ask credit only for the time lost by reason of an unavoidable accident,"* etc.

II

The Government's *Demurrer* (Tr. p. 23-24), raised the following points *only*:—

and they did not exist or the Government would not have stood on its demurrer and waived proof of the facts on a trial.

4—It does not appear that the Defendant made *any effort* to relieve this crew *before* the 16 hours expired.

This ground is covered by the last suggestions.

5—That the facts pleaded do not constitute a defense.

If, as charged, the *overservice* was 1 hour and 30 minutes, and the *unavoidable accident caused* this exact period of *delay and overservice*, and the Answer does sufficiently state these facts, it undoubtedly states a defense, if an overservice caused by an unavoidable accident be a defense or excuse as it is within the first proviso of Section 3.

III

The charge in the *last six* counts of the Complaint is, that the Defendant in Error required the members of this train crew, between their *starting* terminal Tucson and their *destination* terminal Bowie *to remain on duty* 1 hour and 30 minutes *overtime*. (Tr. p. 7-13.)

The *Answer* of Defendant in Error to this charge is: (a) that the train was *delayed* en route 1 hour and 30 minutes; *how?* (b) by reason and on account of *the train breaking in two*, as a *result of what?*

(c) *A cause not known* to the Defendant, &c. *at the time* said *train left Tucson; Why?* (d) because 1st it was caused *by an unavoidable accident*, and 2d, such breaking in two *could not have been foreseen.*

The *Proviso* of Section 3 of this Act, expressly declares:

"Provided, *that the provisions of the Act shall not apply in any case of* (a)—*casualty;* (b)—*Unavoidable Accident* or Act of God; *nor* where the *delay* was the *result of a cause not known* to the carrier * *at the time* said employee *left a terminal*, and which *could not* have been *foreseen.*"

The *Government* contends (1)—That this *Proviso* is *not* absolute and does not remove the run of the train between the *fixed service* terminals *of the train crew, out* of the requirements of Sections 1 and 2 of this Act, but leaves the train crew *still subject* to the provisions of Sections 1 and 2, with the *time* of service running, and imperatively requiring their relief at the end of 16 hours and the 10 hours of rest; regardless of the *intervention* of the four cases and conditions the happening of which it appears certain was intended by Congress to *lift that train crew and their service out* of the Act, and leave such train and its crew and their service in the same position they would be had this Act never been passed; and the Government contends: (2)—That this *Proviso* of Section 3 does *not* have *any effect at all* on the *service of the train crew, unless* the Rail-

road is able to show *conclusively* that it was impos*sible* to relieve the crew, because of the time or the place or the practically absolute impossibility of obtaining a relief crew, within the 16 hours, and this too, notwithstanding how far away from or how near to the crew terminals or their homes these *proviso conditions* existed; and overlooking the apparent absurdity of their first contention by the result of their admissions as to the *effect* of the *proviso* conditions, admitting that, while asserting the causes and evils resulting in the enactment of this Act to be protection of the Public and the crews from *too long* service and *too short* rest—these causes and evils their contention concedes may still exist and continue for periods of service *no matter how long*, and the railroad be exonerated if it be *practically impossible* to relieve the crew within the 16 hours.

The Defendant in Error insists, that when *any* one or more of the *four* cases and conditions enumerated in the Proviso of Section 3 arise, that train and its crew are obviously intended to be taken absolutely without the provisions of this Act, and left as to its future progress with that crew between that crew's terminals of service, with the same effect as if this Act had never been passed; that when anyone or more of these *proviso* conditions happen to any train and its crew while passing from the starting service terminal to the terminating service terminal of that crew, the Railroad is *not subject to any* of the provisions of this Act, and cannot be penalized because, from the time of leaving their service term-

inal, owing to the occurrence of any one or more of this *proviso* conditions, that train and its crew continue in service more than 16 hours in reaching their destination terminal, or starting terminal if they return thereto *after* the occurrence which brings the train and its crew within this *proviso.*

Are we correct in this contention? We submit that this contention is correct and that we are supported by:—

First: The *Interstate Commerce Commission* in its Ruling 88, ruled and held, as quoted by District Judge *Sawtelle*, in U. S. vs. A. T. & S. F. Ry. Co., 212 Fed. 1000, 1005, as follows:—

> "In this connection, it might be well to refer to the administrative rulings of the Interstate Commerce Commission, as contained in its Twenty-Second Annual Report, dated December 24, 1908. In referring to the act in question, the Commission said:
>
> "Questions immediately arose as to its proper interpretation. With a view to explaining in so far as possible those features of the act which might be claimed to be ambiguous, the Commission issued the following administrative rulings: * * * 'Section 3. * * * *Employés unavoidably delayed by reason of causes that could not, at the commencement of a trip, have been foreseen, may lawfully continue on duty to the terminal or end of that run.*' "
>
> Thus it appears that the Commission to which was intrusted the execution of this law, and whose duty it was to ascertain whether or not its provisions were being observed, not only ruled that, "Employés *unavoidably delayed by*

reason of causes that could not, at the commencement of a trip, have been foreseen, *may lawfully continue on duty to the terminal or end of that run,*" but actually used the words "terminal" and "end of that run" synonymously. In other words, *they not only defined the word "terminal"* to mean the equivalent of the *end of that run,* but actually held that employés unavoidably detained by reason of causes that could not, at the commencement of the trip, have been foreseen may *"lawfully continue on duty to the terminal or end of that run."* See Conference Rulings of the Commsision issued April 1, 1911, page 24, Rule 287, which is as follows:

"Any employé so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip."

See, also, pamphlet issued by the Interstate Commerce Commission, containing "The Hours of Service Law and the administrative rulings and opinions therein printed by order of the Commission March 25, 1912," which contains this same rule 287.

The Commission did not then believe that it was the duty of the carrier to stop the train at the first suitable stopping place and there tie up until the men could be relieved, as is contended was the duty of the railroad company in this case.

These administrative rulings were promulgated by the Commission because, as was stated by them, questions immediately arose as to the proper interpretation of the act, and with a view to explaining, in so far as was possible,

those features which might be claimed to be ambiguous, the Commission adopted the rulings above quoted; and it is reasonable to suppose that such administrative rulings were intended for the guidance of the carrier and trainmen and others having to do with the movement of trains. We heartily agree with the Commission that the terms of the act "are susceptible of more than one interpretation."

That the 'construction of a statute by those charged with the execution of it is always entitled to the most respectful consideration, and ought not to be overruled without potent reasons," was the rule announced at a very early day by the Supreme Court of the United States and reiterated in a very large number of cases. Heath v. Wallace, 138 U. S. 573, 11 Sup. Ct. 380, 34 L. Ed. 1063, and cases cited."

Second:—By the decision of District Judge *Sawtelle*, in the above cited case (reported 212 Fed. 1000).

Third:—By the decision of the Circuit Court of Appeals for the Eighth Circuit, in the case of U. S. vs. Missouri Pac. Ry. Co. 213 Fed. 169 (quoted from above), Circuit Judge *Sanborn* rendering the Opinion said;—

"*The plaintiff demurred to this answer*, and counsel for the United States *contend* that the *decision overruling* that demurrer was erroneous: (1) Because the proviso of section 3 of the hours of service law is inapplicable to telegraphers, train dispatchers, and others of

if any casualty, unavoidable accident, or act of God would relieve telegraphers from all limitation, of the hours of service. But there are many emergencies in the operation of railroads which are neither caused by nor are they casualties, unavoidable accidents, or acts of God, and the application of the four-hour limitation of excessive service to such emergencies would give it ample scope and effect. Moreover, even if the meaning of the word "emergencies" were identical with the aggregate meanings of the words "casualties, unavoidable accidents and acts of God," neither of the two provisions under consideration would be effective and they would only be cumulative. Each would have force. * * *

There are other reasons not less convincing why the position of counsel for the government is not tenable. If the parts of this act of Congress that are not relevant to the question under consideration are laid aside, the clear terms of section 2 prohibit the service of telegraph operators and train dispatchers in day offices more than 13 hours, and in cases of emergency more than 4 hours longer in 24 hours, prohibit the service of such operators and dispatchers in night and day offices more than 9 hours and in case of emergency more than 4 hours more in 24 hours, and prohibit the service of other employés more than 16 hours in 24 hours. The expressed terms of section 3 make every common carrier liable for a penalty of $500 for every violation of section 2, and declare that *none* of the provisions of the act *shall apply* in any case of casualty, unavoidable accident, or

their class who fall under the terms of section 2 of the act; (2) because the failure of the defendant, under the circumstances pleaded in the answer to secure a relief operator, constituted no excuse for keeping the regular operator on duty after the expiration of the 13 hours of service specified for him in section 2 of the act; and (3) because the derailment pleaded in the answer was not such a casualty or unavoidable accident as justified the defendant in keeping the operator on duty beyond the 13 hours of service specified in the act. * * *

[1, 2] Are the provisions of section 2 which relate to telegraph operators, train dispatchers, and other employés of their class excepted from the declaration of the proviso of section 3, "that the provisions of this act shall not apply in any case of casualty or unavoidable accident, or the act of God? *Counsel for the United States contend* that this question should be answered in the affirmative because section 2 provides that telegraph operators and train dispatchers may serve "in case of any emergency" four hours longer than the time generally fixed for their services when there is no emergency, and they argue that *this provision for four hours excess service limits all excess service by them*, whether demanded by an emergency, a casualty, an unavoidable accident, or an act of God; that casualties, accidents, and grave catastrophies resulting from landslides, floods and other external incidents bear more heavily upon other employés than upon telegraphers, and that the four-hour limitation in case of an emergency would become ineffective

act of God. If *none* of the provisions of the act *apply* in any case of casualty, unavoidable accident, or act of God, then the provisions of the act which prohibit the service of telegraph operators and train dispatchers in day offices for a longer period than 13 hours, and in case of emergency 4 hours more in 24 hours, do not apply in such cases, and so it is that the unambiguous terms of the act expressly declare that *the limitations of the hours of service* of telegraphers and train dispatchers in section 2 have no application in any case of casualty, unavoidable accident, or act of God. * * *

[4] The apparent and natural meaning of the terms of a statute is always to be preferred to any curious hidden signification deduced by the reflection and ingenuity of acute and powerful intellects, and where the language of a statute is unambiguous and its meaning is plain, no room is left for construction. United States v. Ninety-Nine Diamonds, 139 Fed. 961, 964, 72 C. C. A. 9, 12, 2 L. R. A. (N. S.) 185; First National Bank of Anamoose v. United States, 206 Fed. 374, 124 C. C. A. 256, 46 L. R. A. (N. S.) 1139.

Congress had the right and power *to prohibit the application of all or of only a part* of the provisions of the act in cases of casualties, unavoidable accidents, and acts of God. It enacted "that the provisions of this act *shall not apply* in any case of casualty or unavoidable accident or the act of God," *and it made no exception.* The construction for which counsel for the government contends requires the amendment of this prohibition by the interpo-

lation of an exception therein so that it will read:

"That the provisions of this act, except those in section 2, which relate to the hours of service of the operators and train dispatchers and others of their class, shall not apply in any case of casualty, or unavoidable accident or the act of God."

The *purpose* of the provision of section 3, "that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God," evidently was *to relieve* the common carriers and their employés in such cases *from all* the provisions of the act *limiting* the hours of service of the latter, and the reason for the provision is plain. *Congress perceived, and reflection will convince any one,* that the protection, safety, and welfare of travelers and employés upon railroads require that in such cases *hard and fast rules shall yield* to the demands of humanity and the necessities of the cases. The *times when* such casualties will occur and when such cases will arise *cannot be foreseen. An unavoidable accident is as likely to occur within the last as within the first 10 minutes of the limited 16 hours of the service of a trainman.* It is as likely to occur within the last five minutes of the limited four hours excessive service of a telegraph operator as in the first minutes of his limited 9 or 13 hours of service. It is conceded that carriers and all their employés, except operators, train dispatchers, and members of their class, are exempt from the limitation of their hours of service in every case of casualty, unavoidable accident, or act of God. * * * The object of

the statute, the safety of travelers and employés, the necessities of the cases of railroad casualties and accidents, the demands of humanity, and a rational and practical interpretation of the statute converge with compelling force to convince that the *Congress intended* what it expressed, that "the provisions of the act," *all the provisions* of the act, those relating to the hours of service of telegraphers and train dispatchers, as well as those relating to the hours of service of other employés, "*shall not apply* in any case of casualty or unavoidable accident or the act of God."

Third: By the *Supreme* Court, in Missouri K. & T. Ry. Co. vs. U. S., 34 Supreme Court Reporter, 26, 27 (decided: November 10, 1913), where Mr. Justice *Holmes* rendering the Opinion seems to have treated the question as *undisputed,* using the following language:—

"Without stopping to consider whether this argument would be met by the *proviso* declaring a "*delay*" in certain cases *not within the Statute* * It is urged that in one case the delay was the result of a cause, a defective injector, that was not known to the carrier and could not be foreseen when the employees left a terminal, and that *therefore, by the proviso in Section 3, the Act does not apply.*"

Fourth:—And by *this* Circuit Court of Appeals, in U. S. vs. Northern Pac. Ry. Co. 215 Fed. 64, 67 (decided August 3, 1914), where Circuit Judge *Ross* rendering the Opinion uses this language,

> Where the charge was *continuing* the train crew *on duty, without rest, after* an "unavoidable accident":—" * It is expressly conceded by Counsel for the Government that the *delay* of the crew in question on its regular run from Tacoma to Portland was due to the "unavoidable accident" at South Tacoma. It is equally plain from the undisputed evidence that the accident was the sole cause why the crew in question was engaged on its run for more than 16 hours without a rest of 8 consecutive hours, so that the question is, whether the circumstances of the case bring it within the first proviso to Section 3 of the Act of Congress, upon which the action is based. * Under such circumstances, it would not, we think, be reasonable to hold the Company liable for their failure to check up the time of service of the various crews of the very numerous trains passing over this particular piece of road at that particular time. And *such*, we think *was the view* of Congress *in providing, as it did, that the Act* of May 4, 1907, *should "not apply in any case of* casualty or *unavoidable accident."*

Fifth:—By the Supreme Court of South Carolina, in Black vs. Charleston & Western C. Ry. Co., 69 S. E. 230, 31 L. R. A. N. S. 1184, where that Court said of this Act of Congress:—

> "Moreover, *by its own terms, the Act does not apply* in cases of casualty, unavoidable accident, or the Act of God; *nor* where the *delay* was the result of a cause not known to the carrier when the employees left a terminal, and which could not have been foreseen. There-

fore, if the *delay* was due to any of said causes, it would *not* have been a violation of the Act of Congress to permit the crew to remain on duty more than 16 hours * * *".

Therefore, we respectfully submit, that when *any* one or more of the *four* conditions enumerated and stated in the *proviso* to Section 3 of this Act, occur, that train and its train crew so involved, are absolutely lifted out of and exempted from *all* of the provisions of the entire Act, with the same effect and result as if this Act had never been passed, and the *crew* of that train may be permitted to remain *with their train on duty until* that train either returns to its starting or reaches its destination *service terminal* of that crew, without any violation of this Act.

It is respectfully submitted, that the judgment appealed from by the Writ of Error in this case, should be affirmed.

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